(1)

Supreme Court, U.S.
FILED

No. 95-8806 OCT 11 1996

OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1995

JAMES EDWARD HEGLER,
Petitioner,
vs.
ROBERT BORG, Warden;
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES G. BAKALY, III
(Counsel of Record)
103 Oronoco Street, Suite 200
P.O. Box 26356
Alexandria, Virginia 22313
(703) 706-0038
CHARLES G. BAKALY, JR.
521 Michigan Boulevard
Pasadena, California 91107
(818) 564-0033
JAMES R. ASPERGER
DEBRA L. BOYD
MICHAEL C. LEVINE
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071
(213) 669-6000
Attorneys for Petitioner

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

75

QUESTIONS PRESENTED FOR REVIEW

1. Whether constitutional "structural error" arises when: (a) the defendant is absent from a readback of testimony during jury deliberations; and (b) the judge is absent from and did not rule on the propriety of the readback.

2. If not, whether the harmless error analysis that applies to collateral review of constitutional "trial error" requires a court: (a) to assess the prejudice resulting from the defendant's and judge's absence in light of the entire trial record; and (b) to allocate to the State the burden of proof in any evidentiary hearing required for this purpose.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
The Murder	6
The State Court Trial	6
The Unconstitutional Readback Of Trial Testimony	7
The Verdict	8
Appeals in State Court	8
The Petition For Habeas Corpus	8
The Ninth Circuit's *Hegler I* Decision	9
The Evidentiary Hearing	9
The Ninth Circuit's *Hegler II* Decision	12
REASONS FOR ISSUING A WRIT OF CERTIORARI IN THIS CASE	13
I. THIS COURT SHOULD CLARIFY THAT THE ABSENCE OF THE DEFENDANT AND JUDGE FROM THE READBACK OF TRIAL TESTIMONY AND THE JUDGE'S FAILURE TO SUPERVISE THE READBACK ARE STRUCTURAL, AND NOT TRIAL, ERRORS UNDER *BRECHT V. ABRAHAMSON* AND *ARIZONA V. FULMINANTE*	13
A. The Ninth Circuit's Decision that the Defendant's Absence from the Readback was Trial Error is Arbitrary and Contrary to this Court's Authority	14

TABLE OF CONTENTS

Page

B. The Effect of a Judge's Absence from the Readback and Failure to Rule on the Propriety of the Requested Readback is an Issue Resolved Inconsistently in the Lower Courts 19

II. THE COURT SHOULD CLARIFY THE HARMLESS ERROR STANDARD ARTICULATED IN *BRECHT* 22

A. The Ninth Circuit Failed to Examine the Error in the Context of the Entire Trial Record 23

B. This Court Should Clarify Whether the State or the Habeas Petitioner Has the Burden of Proof at an Evidentiary Hearing..... 25

CONCLUSION 28

APPENDIX..... 1a

TABLE OF AUTHORITIES

Cases

Page(s)

Arizona v. Fulminante, 499 U.S. 279 (1991) 13, 14, 15, 18, 22

Brecht v. Abrahamson, ____ U.S. ____, 113 S. Ct. 1710 (1993) 13, 14, 15, 22, 23, 24, 25, 26

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 4

Capital Traction Co. v. Hof, 174 U.S. 1 (1898) ... 14

Chapman v. California, 386 U.S. 18 (1967) 22, 25

Glee v. State, 639 So.2d 1092 (Fla. 1994) 20

Haith v. United States, 342 F.2d 158 (3d Cir. 1965) . 20

Hays v. Arave, 977 F.2d 475 (9th Cir. 1992) .. 15, 16, 18, 21

Illinois v. Allen, 397 U.S. 337 (1970) 13

Kotteakos v. United States, 328 U.S. 750 (1946) ... 22, 23

Lee v. Marshall, 42 F.3d 1296 (9th Cir. 1994) 15, 24

Lewis v. United States, 146 U.S. 370 (1892) 13

McBrady v. State, 459 N.E.2d 710 (Ind. 1984) 20

O'Neal v. McAninch, ____ U.S. ____, 115 S. Ct. 992 (1995) 25, 26, 27

Rice v. Wood, 44 F.3d 1396 (9th Cir. 1995) 15, 16, 17, 18, 21

Riley v. Deeds, 56 F.3d 1117 (9th Cir. 1995) 4, 14, 15, 20, 21, 27

Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995) .. 15

United States v. Barker, 988 F.2d 77 (9th Cir. 1993) 19

United States v. Binder, 769 F.2d 595 (9th Cir. 1985) 18

United States v. Felix Rodriguez, 22 F.3d 964 (9th Cir. 1994) 15

TABLE OF AUTHORITIES

Cases

	Page(s)
United States v. Fontanez, 878 F.2d 33 (2d Cir. 1989)	17
United States v. Neff, 10 F.3d 1321 (7th Cir. 1993)	5
Wade v. United States, 441 F.2d 1046 (D.C. Cir. 1971)	17
Ware v. United States, 376 F.2d 717 (7th Cir. 1967)	17, 24

Statutes and Rules

28 U.S.C. § 1254(1)	2
28 U.S.C. § 2253	9, 12
28 U.S.C. § 2254	8
Federal Rule of Criminal Procedure 2	13
Federal Rule of Criminal Procedure 43	13

Other Authorities

1 J. Wigmore, Evidence § 21 (3rd ed. 1940)	25

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

JAMES EDWARD HEGLER,
Petitioner,
VS.
ROBERT BORG, Warden;
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Petitioner James Edward Hegler ("Hegler") prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"), which was rendered in this case on March 27, 1995.

OPINIONS AND ORDERS BELOW

The Opinion of the Ninth Circuit of which Petitioner Hegler seeks this Court's review is reported at 50 F.3d 1472 (9th Cir. 1995), and is reproduced in the Appendix at 1a-12a. A prior Opinion of the Ninth Circuit in this case is referenced in the "Table of Decisions Without Reported Opinions" that appears at 990 F.2d 1258 (9th Cir. 1993), and is reproduced in the Appendix at 30a-33a.

Other pertinent opinions, orders, and reports of the Ninth Circuit, the United States District Court for the Central District of California (the "District Court"), and the United States Magistrate Judge of the District Court (the "Magistrate Judge") are unreported and are reproduced in the Appendix.

JURISDICTION

On March 27, 1995, the Ninth Circuit filed and entered the Opinion and Judgment that Petitioner Hegler presently seeks to be reviewed by this Court. (Appendix 1a-12a.)

On June 2, 1995, the Ninth Circuit filed and entered an order recalling the mandate that it had previously issued for the purpose of filing and considering Petitioner Hegler's petition for rehearing and suggestion for rehearing *en banc*. (Appendix 14a.) Thereafter, on July 14, 1995, the Ninth Circuit filed and entered an order denying Petitioner Hegler's petition for rehearing and rejecting his suggestion for rehearing *en banc*. (Appendix 13a.)

This Court has jurisdiction to review the Ninth Circuit's judgment in this case by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compul-

sory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254(a):

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

In this case, neither the petitioner nor the trial judge was present when the court reporter read back critical inculpatory trial testimony to the jury during its deliberations. The record also fails to reflect that the trial judge ruled on the jury's request that the testimony of the State's key witness be reread. At the trial judge's request, counsel (but not Petitioner Hegler) stipulated that the court reporter could read back "anything" the jury wanted to hear. The Ninth Circuit determined that the stipulation by counsel did not waive Petitioner Hegler's constitutional rights during the read back, which, petitioner submits, include his right to be present, to have the judge present, and to have the judge

rule on the propriety of reading back the particular trial testimony requested by the jury.

Although the Ninth Circuit ruled that Petitioner Hegler's unwaived absence was constitutional error, it concluded that his absence was not "structural error" that required an automatic reversal of his conviction. The Ninth Circuit's decision in this regard is inconsistent with the decisions of this Court and reflects several arbitrary distinctions the lower courts have made when classifying a defendant's unwaived absence as structural or trial error. The Ninth Circuit did not comment on the prejudice resulting from either the judge's absence during the readback or the judge's abdication of her obligation to rule on the propriety of the jury's request for the readback. These concerns were not raised below because the Ninth Circuit decided a case of first impression on these issues long after Petitioner Hegler filed his petition for rehearing.[1] *See Riley v. Deeds*, 56 F.3d 1117 (9th Cir. 1995).

---

[1]The judge's absence at and failure to rule on the propriety of the readback are significant sources of additional constitutional error in this case. As discussed *infra* at 20, there is considerable conflict among courts as to the effect of a judge's absence during a readback, and the issue is ripe for this Court's review. Although not raised below, Petitioner Hegler raises the issue here under the principle that, where an important question presents purely an issue of law, the Court may consider the question on certiorari. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984). Petitioner Hegler submits that the record establishes that the trial judge was absent and failed to consider the propriety of the requested readback. The court reporter was clearly in charge of the readback proceedings, which took place in the jury room, and the judge proposed a stipulation (to which counsel — but not Hegler — agreed) that effectively eliminated the judge's role in the proceedings and gave the court reporter authority to read back whatever the jury requested. The record contains no indication that the judge was consulted about or ruled on the propriety of reading the particular testimony requested by the jury. (*See* discussion *infra* at 7-8, 11.) Where, as here, the record fails to indicate that proper constitutional

In addition, the harmless error analysis employed and approved by the Ninth Circuit focused only upon an evidentiary hearing held by the Magistrate Judge to determine whether, during the readback of testimony to the jury, there was any improper conduct by the court reporter (such as an inaccurate readback of the testimony or inappropriate inflection or comment). The Ninth's Circuit's decision, however, failed to make the key inquiry that is required by this Court's past decisions — *i.e.*, whether, given the quantity and quality of the inculpatory evidence adduced at trial, Petitioner Hegler's absence at the readback had a substantial and injurious effect or influence in determining the jury's verdict. This error was particularly egregious given the fact that the readback was the testimony of the key prosecution witness, and that the other inculpatory evidence in this case was extremely weak. The Ninth Circuit also erred by implicitly approving the Magistrate Judge's allocation of the burden of proof in the evidentiary hearing to the petitioner, contrary to this Court's longstanding rule that the burden lies with the State.

Thus, this case affords the Court with the opportunity to clarify three confusing, but significant, areas of constitutional criminal law: (1) whether a defendant's unwaived absence from the readback of testimony is structural or trial error; (2) whether the judge's absence at and failure to rule on the propriety of the readback is structural or trial error; and (3) if trial error, the proper analysis to apply to determine whether the error was harmless.

---

safeguards were in place at trial, error is presumed. *See United States v. Neff*, 10 F.3d 1321, 1324-25 (7th Cir. 1993).

In the event the Court determines that the record is inadequate to permit a decision on the merits, Petitioner Hegler intends to file a second petition for writ of habeas corpus on these grounds.

The Murder.

In the fall of 1984, Kerry James (hereinafter referred to as the victim) parked his car near an apartment complex in the City of Los Angeles and attempted to purchase narcotics from two men standing in an adjacent driveway. A dispute arose during the transaction, and the victim was shot as he went back to his car. After driving a short distance away, the victim died of a gunshot wound. (Appendix 21a.)

The State Court Trial.

Petitioner Hegler was charged with first degree murder. At the trial, which took place in October 1985, witness Jeanetta Thomas was the State's primary source of circumstantial evidence and provided the key testimony linking Petitioner Hegler to the murder. (Appendix 3a.) Significantly, no witness, including Ms. Thomas, actually saw who shot the victim, no murder weapon was ever found, and Petitioner Hegler (who presented an alibi defense) consistently denied committing the murder. Ms. Thomas was 17 years old, nine months pregnant and in front of the apartment complex dealing rock cocaine on the night of the murder. Ms. Thomas admitted that she had free-based cocaine only a few hours prior to the murder. (Appendix 21a-22a; R.T. 355.)[2]

Ms. Thomas identified Petitioner Hegler as someone she had known for approximately one year as "J-Stone." She testified that J-Stone was one of the two men standing in the driveway from which the shooting later occurred. She stated that J-Stone had on a white T-shirt with short sleeves and that she could see his arms. She said that the other man in

---

[2]"R.T. 355" refers to page 355 of the court reporter's transcript of the trial of this matter. "C.T." refers to the State court clerk's transcript in this matter. "R.T.E." refers to the transcript of the evidentiary hearing held by the Magistrate Judge on September 21, 1993.

the driveway had on a long-sleeved, black jacket. (Appendix 21a.)

Ms. Thomas further testified that she watched and heard the beginning of the purported narcotics transaction between J-Stone and the victim, who had approached the two men, and then saw the victim get pushed up against a fence. (Appendix 22a.) The two men immediately stepped into a driveway and were out of her view. (R.T. 140-141.) According to Ms. Thomas, after the victim started to go back to his car, she "just heard a gunshot" and saw a bare arm "sticking out" from the location of the driveway, and saw the spark from the gun as it was fired. (Appendix 22a; R.T. 67-68; 71-21.) She subsequently heard a second shot. She did not, however, see the face of the person with the gun, and admitted, "I don't know who shot him." (Appendix 22a; R.T. 159.)

Petitioner Hegler denied the murder. Both he and an alibi witness stated that he was at a Fat Burger fast food restaurant at the time of the murder. No weapon was recovered. (Appendix 22a-23a; R.T. 355.)

The Unconstitutional Readback Of Trial Testimony.

At the conclusion of the trial, the trial judge asked "if counsel will stipulate if the jury wishes to hear anything read that the reporter may go in with the bailiff and read to the jury?" Both defense counsel and the prosecutor stipulated to this procedure.[3] (Appendix 19a.)

After beginning their deliberations, the jurors asked to hear again the testimony of Ms. Thomas, the State's key

---

[3] Petitioner Hegler was never asked if he wanted to be present at the readback, and did not know a readback occurred until long after the trial ended. (R.T.E. 68-69.) The Ninth Circuit determined that the petitioner did not waive his right to be present by virtue of his counsel's stipulation. (Appendix 3a.)

witness. (C.T. 326.) The record shows that the judge had not ruled on the propriety of the jury's particular request and was absent from the readback. (C.T. 326-327; R.T.E. 52.) Neither Petitioner Hegler nor his trial attorney were present when the court reporter read back Ms. Thomas' testimony to the jury from her stenographic notes. (Appendix 3a, 9a.) The original testimony ultimately was transcribed to approximately 90 pages. (R.T. 43-74, 101-159.) No independent record was made of the readback. (R.T.E. 52.)

The Verdict.

On October 16, 1985, within two hours of the conclusion of the readback, the jury returned a guilty verdict, convicting Petitioner Hegler of first-degree murder with the use of a firearm. He was sentenced to state prison for twenty-five years to life with a two-year enhancement for the weapons finding. (Appendix 36a; C.T. 327.)

Appeals in State Court.

Following his conviction in the state trial court, Petitioner Hegler appealed to the California Court of Appeal, on the ground, *inter alia*, that his conviction was unconstitutional as a result of his unwaived absence during the readback of Ms. Thomas' testimony to the jury. In 1987, the California Court of Appeal affirmed Petitioner Hegler's conviction for first degree murder. Petitioner Hegler then filed a petition for review with the California Supreme Court, which was denied. (Appendix 3a.)

The Petition For Habeas Corpus.

Having thus exhausted his state law remedies, on October 23, 1991, Petitioner Hegler, in *pro se*, filed a petition for a writ of habeas corpus in the District Court, which had jurisdiction pursuant to 28 U.S.C. § 2254. Petitioner Hegler claimed that he was denied the right to counsel and the right

to be present when Ms. Thomas' testimony was read back to the jury. (Appendix 36a-37a.)

On January 24, 1992, Magistrate Judge Carolyn Turchin issued a report and recommendation, concluding that Petitioner Hegler "ha[d] not sustained his burden of demonstrating that his conviction was obtained in violation of his constitutional rights." (Appendix 40a.) On February 20, 1992, United States District Judge David W. Williams adopted the Magistrate Judge's report and recommendation and, accordingly, entered judgment denying the petition for habeas corpus and dismissing the action with prejudice. (Appendix 35a.)

The Ninth Circuit's *Hegler I* Decision.

Petitioner Hegler appealed the District Court's decision to the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 2253. In an unpublished memorandum decision filed on April 6, 1993, the Ninth Circuit determined that the record did not establish that Petitioner Hegler had waived his right to be present during the reading of the trial testimony, and that his absence from that proceeding was constitutional error. Because the State had not produced any evidence to overcome the presumption that the error was prejudicial, the Ninth Circuit reversed and remanded the case for further proceedings to determine if the error was harmless. (Appendix 30a-33a.)

The Evidentiary Hearing.

Upon remand, the Magistrate Judge held an evidentiary hearing to decide whether Petitioner Hegler's unwaived absence from the readback of Ms. Thomas' trial testimony affected the jury's verdict. Petitioner Hegler was appointed counsel to assist him at the evidentiary hearing. The court reporter, four of the jurors in the case and the petitioner were called to testify. The sole factual inquiry made was

whether the court reporter had read back Ms. Thomas' trial testimony to the jury with accuracy and without inappropriate tonal inflection or other improper influential mannerisms.[4] No factual inquiry was made concerning the effect that Petitioner Hegler's presence at the readback may have had on the jury's decision given the minimal quantity and weak and circumstantial nature of the evidence adduced against him at trial. (Appendix 18a-29a.)

Neither the court reporter nor the jurors could remember any specific details of the content of the readback; the court reporter, in fact, could not even remember doing the readback. (Appendix 24a.) Because there was no independent record, there was no indication that the readback was complete and no assurance that exculpatory portions were not omitted, *e.g.*, Ms. Thomas' statement, "I don't know who shot him." Indeed, there was a dispute over how much of the testimony was read back. Based on her log, the court reporter indicated that she thought she read back the witness' entire testimony, which comprised 90 pages of transcript and, according to the record, spanned two days of deliberations. Some of the jurors, however, believed that the readback was significantly shorter; indeed, one stated that it lasted only "minutes." (R.T.E. 60.) The court reporter committed two mistakes in the very short portion of testimony she read from her notes at the evidentiary hearing, one of which was substituting the word "proximate" for "block." (Appendix 24a.)

---

[4]The evidence adduced at the evidentiary hearing focused on the following: (1) the court reporter's training and experience; (2) a demonstration of the court reporter's readback style using her stenographic notes of a small portion of Ms. Thomas' testimony; and (3) the testimony of four of the jurors who sat on the jury that convicted Petitioner Hegler that the court reporter's readback during their deliberations was without emphasis or inflection. (Appendix 18a-29a.)

The transcript of the evidentiary hearing also establishes that the readback took place in the jury room and that the court reporter was in charge of the readback proceeding. One of the jurors testified that after the readback began, she asked the court reporter if she could be excused for a few minutes and the court reporter refused her request, confirming the absence of the judge from the proceedings. (R.T.E. 40, 51-52.) There was also no evidence adduced to show that the court reporter first obtained the judge's permission to conduct the readback of the particular testimony requested by the jury.

On January 5, 1994, the Magistrate Judge submitted her report and recommendation to the District Court. First, the Magistrate Judge declined to construe the constitutional error as structural and, instead, held it to be trial error subject to harmless error analysis. Second, the Magistrate Judge found that the error in this case was harmless. Placing a burden of proof in the evidentiary hearing on Petitioner Hegler, she determined that: (1) "petitioner has not demonstrated that there was prejudicial contact between the court reporter and the jurors and the record of the evidentiary hearing reflects a readback devoid of the concerns enumerated in the [Ninth Circuit's] Memorandum Opinion such as improper voice inflection and emphasis;" and (2) "petitioner has not demonstrated that there was a material omission or misstatement [in the court reporter's readback of Ms. Thomas' testimony]." (Appendix 28a.) The Magistrate Judge, however, did not analyze the quantity and quality of the inculpatory evidence adduced at trial and compare it to the effect that a defendant's presence could have on a jury in order to determine whether Petitioner Hegler's unwaived absence from the readback may have affected the jury's decision.

On January 31, 1994, the District Judge adopted the Magistrate Judge's report and recommendation and,

accordingly, entered judgment denying the petition for habeas corpus and dismissing the action with prejudice. (Appendix 16a-17a.)

The Ninth Circuit's *Hegler II* Decision.

Petitioner Hegler again appealed to the Ninth Circuit pursuant to 28 U.S.C. § 2253, contending that the violation of his Sixth Amendment constitutional right to be present at the rereading of trial testimony to the jury during deliberations was "structural error" that required automatic reversal of his conviction. Alternatively, Petitioner Hegler contended that the error was not harmless.

In a published decision filed on March 27, 1995, the Ninth Circuit held that: (1) a defendant's unwaived absence from a readback is trial error — not structural error — and is, therefore, subject to harmless error analysis; and (2) Petitioner Hegler's unwaived absence from the readback in this case was harmless error. Like the District Court, which adopted the Magistrate Judge's report and recommendation, the Ninth Circuit relied only upon the evidence adduced at the evidentiary hearing, and concurred that there was no evidence of improper conduct or omissions during the readback. Similarly, the Ninth Circuit also failed to consider the entire trial record to determine whether Petitioner Hegler's absence affected the jury's verdict. (Appendix 1a-12a.)

On May 8, 1995, Petitioner Hegler petitioned the Ninth Circuit for rehearing and suggested a rehearing *en banc*. On June 2, 1995, the Ninth Circuit filed and entered an order recalling the mandate that it had previously issued for the purpose of filing and considering Petitioner Hegler's petition for rehearing and suggestion for rehearing *en banc*. Thereafter, on July 14, 1995, the Ninth Circuit filed and entered an order denying Petitioner Hegler's petition for

rehearing and rejecting his suggestion for rehearing *en banc.* (Appendix 13a-14a.)

Petitioner Hegler now seeks review by this Court.

REASONS FOR ISSUING A WRIT OF CERTIORARI IN THIS CASE

I. THIS COURT SHOULD CLARIFY THAT THE ABSENCE OF THE DEFENDANT AND JUDGE FROM THE READBACK OF TRIAL TESTIMONY AND THE JUDGE'S FAILURE TO SUPERVISE THE READBACK ARE STRUCTURAL, AND NOT TRIAL, ERRORS UNDER *BRECHT V. ABRAHAMSON* AND *ARIZONA V. FULMINANTE.*

In this case, the Ninth Circuit determined that a defendant's constitutional right to be present when the jury is reconvened to listen to the readback of key prosecution testimony is not a fundamental one. (Appendix 9a-10a.) This Court long ago established, however, that the right of a criminal defendant to be present personally in the courtroom at every stage of his trial is fundamental to our system of justice. *Lewis v. United States*, 146 U.S. 370, 373 (1892). A defendant's presence at trial is a right guaranteed by the due process clause of the Fifth Amendment, the Confrontation Clause of the Sixth Amendment and, in state-law cases, by the Fourteenth Amendment. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). Although, as in *Allen*, a defendant may lose the right to be present by misconduct or waiver or when his presence has no appreciable impact on the proceedings — none of which is at issue here — a defendant's presence at an important stage of trial is nonetheless a predicate for the essential "fairness in administration" and the "just determination" of criminal proceedings, as codified in Federal Rules of Criminal Procedure 2 and 43.

Similarly, a judge's absence during a criminal trial, including court proceedings after a jury begins deliberations, is error of constitutional magnitude. *See Riley v. Deeds*, 56 F.3d 1117, 1119 (9th Cir. 1995). The presence of a judge is at the "very core" of the Sixth Amendment's guarantee of trial by an impartial jury. *Id.* "This proposition has been so generously admitted, and so seldom contested, that there has been little occasion for its distinct assertion." *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1898). A judge's abdication of his or her obligation to control trial proceedings, as evidenced by a record that reflects that the judge neither was consulted about nor ruled on the propriety of a jury's request for key testimony to be read during deliberation, constitutes fundamental, structural error. *Riley*, 56 F.3d at 1121. The issues raised by the petitioner's and judge's absence from the readback proceeding in this case are significant and warrant this Court's attention.

A. The Ninth Circuit's Decision that the Defendant's Absence from the Readback was Trial Error is Arbitrary and Contrary to this Court's Authority.

The lower courts, including the Ninth Circuit, are struggling to reconcile the notion of constitutional error posed by a defendant's unwaived absence at trial and the structural vs. trial error dichotomy articulated by this Court in *Arizona v. Fulminante*, 499 U.S. 279 (1991) and *Brecht v. Abrahamson*, ____ U.S. ____, 113 S. Ct. 1710 (1993). In *Fulminante*, the Court stated that constitutional errors occurring during a criminal proceeding generally fall into one of two categories: "structural defects in the constitution of the trial mechanism" and "trial errors." *Fulminante*, 499 U.S. at 280. Because structural defects "infect the entire trial process," their existence requires automatic reversal of the conviction. *Brecht*, 113 S. Ct. at 1717. Errors during presentation at trial, on the other hand, can be "quantitatively assessed in the context of other evidence presented in order

to determine [their effect at trial]," and accordingly, are subject to the harmless error standard. *Fulminante*, 499 U.S. at 307-08.

The *Fulminante/Brecht* test, however, is unworkable in analyzing constitutional error when a defendant is absent during trial, and the pertinent lower court decisions reflect inconsistent and arbitrary results. As exemplified by the Ninth Circuit decisions discussed below, the lower courts have been unable to rationally separate structural from trial error in "presence-error" cases such as the instant one. The frequency of this type of constitutional error[5] warrants this Court's intervention to prevent arbitrariness in the administration of criminal proceedings.

In this case, the Ninth Circuit determined that a defendant's unwaived absence during a court reporter's readback to the jury of key prosecution testimony was mere "trial error," subject to a harmless error analysis, and not "structural error" resulting in automatic reversal of the verdict. This result is antithetical to prior Ninth Circuit cases examining a defendant's absence during a stage of the criminal proceeding. In *Hays v. Arave*, 977 F.2d 475, 479 (9th Cir. 1992), the Ninth Circuit determined that "unconstitutional *in absentia* sentencing is a 'structural' error and that a sentence resulting from such a proceeding cannot be affirmed on the basis of harmless error." Similarly, in *Rice v. Wood*, 44 F.3d 1396, *rehearing granted* (9th Cir. 1995), another panel of the Ninth Circuit held that "the trial

---

[5] In the Ninth Circuit alone, there have been at least five reported cases in the four years since *Fulminante* involving the proper redress for the defendant's unwaived absence at trial. *See Turner v. Marshall*, 63 F.3d 807 (9th Cir. 1995); *Rice v. Wood*, 44 F.3d 1396 (9th Cir. 1995); *United States v. Felix Rodriguez*, 22 F.3d 964 (9th Cir. 1994); *Lee v. Marshall*, 42 F.3d 1296 (9th Cir. 1994); *Hays v. Arave*, 977 F.2d 475 (9th Cir. 1992). *See also Riley v. Deeds*, 56 F.3d 1117 (9th Cir. 1995) (judge's absence from readback).

court's decision to proceed in [defendant's] absence [from the return of a death verdict] constituted a structural defect in the criminal proceedings that is not subject to harmless error analysis." *Id.* at 1402.

In *Hegler II*, the Ninth Circuit attempted to distinguish *Hays* and *Rice* in two ways. The Ninth Circuit determined that the defendant's presence during the readback of testimony did not afford the defendant more than a negligible opportunity to "influence" the presentation of the testimony to the jury, whereas a defendant may participate in sentencing (*Hays*) and his presence serves as a "psychological check" when a jury is polled upon return of a death penalty verdict (*Rice*). The court also determined that any error from the defendant's absence at a readback of trial testimony could be readily quantified by assessing the likelihood of the court reporter's inaccuracy or improper behavior in a post-trial evidentiary hearing. (Appendix 9a-10a.) As a result, the Ninth Circuit concluded that, contrary to the right to be present during sentencing (*Hays*) and the return of a death verdict (*Rice*), Petitioner Hegler's right to be present at the readback of testimony was not "fundamental." (Appendix 10a.) None of these distinctions withstands scrutiny. Because the circumstances of the constitutional error involved herein are closely analogous to those in *Hays* and *Rice*, the result in *Hegler II* is arbitrary and unjustified.

First, *Hegler II* cannot readily be distinguished from *Hays* and *Rice* by the nature of the proceeding or role the defendant plays in the proceeding. Contrary to the Ninth Circuit's view, the defendant's role is not negligible in such circumstances. Petitioner Hegler's absence prevented him from affirmatively objecting to any error in the accuracy of the readback or to any improper influence attending the court reporter's tone of voice or inflection, nor could his physical presence serve to moderate the court reporter's conduct. Moreover, he could not request that additional

testimony be read to curb potential prejudice from rereading selected excerpts. As the Ninth Circuit noted in *Hegler I*:

> "The rereading of testimony entails greater risk of prejudice than merely replaying a tape. The court reporter may have improperly influenced the jury through voice inflection and emphasis. Such subtle influences 'might have been unintended, or even unnoticed by the court reporter herself' . . . . Nor would such influences appear in a written transcript of the testimony." (Citation omitted.) (Appendix 32a.)

Second, the Ninth Circuit improperly concluded that Petitioner Hegler's confrontational right was *de minimis* since he could not cross examine the witness during a readback. (Appendix 9a.) His absence, however, meant that the jury was denied the ability to fully evaluate and gauge Petitioner Hegler's reactions to the testimony of the prosecution's main witness, or, as in *Rice*, to "look him in the eye." Indeed, "a defendant . . . [during a readback of testimony] is entitled to be seen by the jury, and the jury, in turn, has the right to view his demeanor — especially where, as here, the jury has expressed a particular interest in a certain portion of the trial testimony relevant to defendant." *Ware v. United States*, 376 F.2d 717, 721 (7th Cir. 1967) (Schnackenberg, J., dissenting) (emphasis in original).

Contrary to the Ninth Circuit's view, the Sixth Amendment's Confrontation Clause is not designed solely to permit cross-examination of witnesses. It is "in good part a constitutional recognition of a psychological influence" of the defendant, "aside from the usefulness the accused may be to his counsel. . . . Moreover, there is the reasonable possibility that the jury speculated adversely to the defendant about his absence from the courtroom." *Wade v. United States*, 441 F.2d 1046, 1050 (D.C. Cir. 1971). *See also United States v. Fontanez*, 878 F.2d 33 (2d Cir. 1989). The psychological value of defendant's presence was necessarily heightened in

this case where the readback permitted emphasis of the "key" (and only "eyewitness") prosecution testimony. Where, as here, there is no evidence corroborating the witness' testimony, "[t]he replay allowed repetition of the government's case." *United States v. Binder*, 769 F.2d 595, 601 (9th Cir. 1985) (reversible error to replay videotape — the only evidence of molestation — in absence of defendant). Thus, Petitioner Hegler's role in the readback was not, as the Ninth Circuit suggested, merely that of an "observer." Like the defendants in *Rice* and *Hays*, he was denied the opportunity to counter the impact of the testimony of the prosecution's key witness with both his physical *and* psychological presence.

Third, there is no way to quantify the prejudice resulting from a presence error. According to *Fulminante*, when the impact of the error cannot be quantitatively assessed, it cannot be characterized as mere trial error. 499 U.S. at 309. The prejudice from a defendant's absence during a court reporter's readback of key testimony is no more amenable to quantification than the prejudice from a defendant's absence during sentencing or the return of the death verdict, yet only the latter have been deemed structural errors by the Ninth Circuit. There is simply no way to determine from an evidentiary hearing years later whether the court reporter omitted key words or phrases from the readback at trial (in this case, whether the court reporter read Ms. Thomas' testimony that she never actually saw who fired the gun). Similarly, although an evidentiary hearing may demonstrate the current skills of the court reporter, it will not demonstrate the reporter's skills at the critical time, i.e., when the actual readback occurred (in this case, eight years earlier). The court reporter in this case testified that she did not recall the *Hegler* readback. Accordingly, her testimony only goes to what she thinks she did, not what occurred. Certainly Petitioner Hegler, who was not at the readback, could not attest to its accuracy or completeness or to the court

reporter's demeanor. Even the Magistrate Judge admitted that "there is no way of knowing with any certainty" whether the court reporter omitted testimony or otherwise influenced the readback. (Appendix 28a.) It necessarily follows that there is "no way of knowing" whether omissions, mistakes or subtle influences of the court reporter prejudiced the jury.

Moreover, there is no way to (and, indeed, the Ninth Circuit did not even attempt to) quantify the psychological or symbolic impact that petitioner's presence might have had on the jury if he had faced them when, in essence, the key prosecution witness retestified against him through the court reporter. Readback of testimony during jury deliberations is a disfavored practice precisely because of the unwarranted impact that may attend the second presentation of evidence and the prejudice that may result. *See, e.g., United States v. Barker*, 988 F.2d 77, 79 (9th Cir. 1993). The prejudice that inured to Petitioner Hegler from the loss of his psychological influence during a readback of the only eyewitness' testimony is inherently significant. It also is not susceptible to quantification. The error, then, cannot rationally be characterized as "trial error" under this Court's precedents, and the Ninth Circuit was mistaken in doing so.

B. The Effect of a Judge's Absence from the Readback and Failure to Rule on the Propriety of the Requested Readback is an Issue Resolved Inconsistently in the Lower Courts.

The error from Petitioner Hegler's absence during the readback is compounded by the fact that the record reflects that the judge neither attended the readback nor ruled on the propriety of the readback of the requested testimony. Indeed, the trial judge expressly abdicated her role in deciding whether testimony should be reread when she asked counsel to stipulate to allow the court reporter to "go in with the bailiff and read to the jury" if the jury wished to

have "*anything* read." (Appendix 19a; emphasis added.) Counsel's agreement to the stipulation could not operate to waive defendant's fundamental right to have a judge preside over all aspects of the trial any more than it could waive his right to be present. (Appendix 3a.)

Subsequent to the filing of the petition for rehearing in this case, the Ninth Circuit ruled, in a case of first impression, that a trial judge's abdication of control over the readback process and his or her absence during a readback constitutes structural error. *Riley v. Deeds*, 56 F.3d 1117 (9th Cir. 1995). The Ninth Circuit pointed out, with lengthy case citations, that there is a clear split of authority among both federal and state courts as to whether the absence of a judge during trial proceedings calls for automatic reversal or is judged by the harmless error standard. *See id.* at 1120-21. *Compare Haith v. United States*, 342 F.2d 158 (3d Cir. 1965) (harmless error analysis); *McBrady v. State*, 459 N.E.2d 719 (Ind. 1984) (same) *with Glee v. State*, 639 So.2d 1092 (Fla. 1994) (reversible *per se*). In *Riley*, the Ninth Circuit determined that the presence of a judge "is at the 'very core' of the constitutional guarantee of trial by an impartial jury." *Id.* at 1119 (citation omitted). More importantly, as here, the record in *Riley* indicated that the judge did not consider and rule on the jury's request for a readback, but rather, the jury determined which testimony and how much of it would be read.[6]

---

[6]As noted, the judge's absence and abandonment of control of the readback process were issues not raised below and, therefore, not decided, by the Ninth Circuit in *Hegler II*, because the Ninth Circuit's decision in *Riley* did not issue until after the petition for rehearing was filed in *Hegler II*. *See* n. 1, *supra* at 4. However, the Ninth Circuit attempted to distinguish *Hegler II* in *Riley* by concluding, without foundation, that the judge in *Hegler* ruled on the jury's request for the readback and presided during the readback proceeding. *Riley*, 56 F.3d at 1120. There is simply no evidence in the *Hegler* record to support the Ninth Circuit's "findings" announced in a wholly different and subse-

The court reporter here was left to her own devices. By virtue of the stipulation, she was to respond with a readback of "anything" the jury wanted to hear. During the unsupervised readback, the defendant was left without the benefit of his own presence and that of the judge, both fundamental safeguards to the prejudicial conduct that can arise from a readback of testimony. As in *Riley*, the result was a "structural vacuum" and a "rule requiring the defendant to show prejudice, or one requiring the state to show lack of prejudice, makes no sense." 56 F.3d at 1121. The constitutional errors in *Hays, Rice* and *Riley* are indistinguishable from those in this case, and the conflicting decisions irreconcilable.

In sum, the Ninth Circuit's conclusion that denial of Petitioner Hegler's constitutional right to be present at the readback is not structural error is unfounded and contrary to this Court's authority, particularly when this error is coupled with a record that reflects the absence of the judge and the judge's express relinquishment of her responsibility to control the readback proceeding. During a stage of the proceedings when the jury was deliberating Petitioner Hegler's guilt or innocence, he and the judge were absent when an unsupervised court reporter read to the jury, from stenographic notes, testimony of the prosecutor's most critical circumstantial evidence against him. As the Ninth Circuit recognized, the testimony was "key." (Appendix 3a.) It was from the only prosecution witness who linked defendant to the crime — a seventeen year old girl who testified that she never actually saw who fired the gun that killed the victim, and who had free-based cocaine earlier on the evening of the murder. Petitioner Hegler also testified at trial and denied

---

quent case. In fact, the record shows that the readback occurred in the jury room and indicates that the reporter — who refused to excuse a juror who requested to leave the jury room to use the bathroom — was solely in charge of the readback proceeding. *See* discussion *supra* at 11.

being at the scene of the murder that evening. Clearly, the jury's decision came down to whether they believed the prosecution's witness or Petitioner Hegler, and their request for a readback of the key testimony underscores the gravity of this stage of the proceedings. Indeed, the jury reached its verdict within two hours of the conclusion of the readback. Petitioner's role at the proceeding would have been both practical and psychological, and the effect of his absence on the jury is not quantifiable.

In classifying defendants' absence from a readback as trial error, the lower courts, and in particular, the Ninth Circuit, have departed from this Court's authority in *Fulminante* and *Brecht*. Without this Court's further guidance, the lower courts will continue to apply these cases in arbitrary fashion. Moreover, the lower courts are clearly split on the effect of a judge's absence from the readback of testimony, an error that is compounded here by the judge's failure to rule upon the jury's request for the readback. The Court should grant the petition for writ of certiorari to resolve and clarify these important and recurring issues.

II. THE COURT SHOULD CLARIFY THE HARMLESS ERROR STANDARD ARTICULATED IN *BRECHT*.

Assuming the *Brecht* harmless error standard[7] was appropriate in this case, the Ninth Circuit has misapplied the harmless error analysis as it pertains to a defendant's and

---

[7] In *Brecht* the Court adopted for cases on collateral review, the standard articulated in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), and grounded in the federal harmless error statute: whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Prior to *Brecht* the State had to show that a constitutional error — whether on direct or collateral review — was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967).

judge's unwaived absence from trial proceedings. This Court's intervention is required to clarify the harmless error analysis to be applied in these cases.

A. The Ninth Circuit Failed to Examine the Error in the Context of the Entire Trial Record.

The Ninth Circuit ignored the fundamental inquiry required by the harmless error analysis. As Justice Stevens emphasized in his concurring opinion in *Brecht*, "the statutory command require[s] the reviewing court to evaluate the error in the context of *the entire trial record*.... To apply the *Kotteakos* standard properly, the reviewing court must, therefore, make a *de novo* examination of the trial record." *Brecht*, 113 S. Ct. at 1724 (emphasis added). In *Brecht*, the evidence of guilt was "cumulative" and "weighty;" accordingly, the error was deemed harmless. *Id.* at 1722. Here, an examination of the record, let alone the "entire record," is noticeably absent, as the Ninth Circuit failed even to comment on the "quantity or quality" of the other evidence in the case.

Indeed, the Ninth Circuit did not even refer to the trial record except to note that the readback testimony, infected with constitutional error, was the State's "key" evidence. (Appendix 3a.) The sole inquiry at the evidentiary hearing was directed to the accuracy and manner of the readback. The Magistrate Judge, District Court and, in turn, the Ninth Circuit, based their conclusions on an assumption that the court reporter probably conducted the readback in an accurate and professional manner. (Appendix 11a-12a.) The Ninth Circuit should have, but did not, consider the fact that the other evidence in this case was neither "cumulative" nor "weighty." There was no corroborative evidence of Ms. Thomas' testimony that the shooter was bare-armed. She was the only "eyewitness" to the shooting, and even she admitted that she did not know who shot the victim. The

other "inculpatory" evidence was, at best, confused and equivocal. No weapon was found and no confession obtained. Significant exculpatory evidence, including Petitioner Hegler's alibi defense, also was ignored by the Ninth Circuit. In addition, the Ninth Circuit did not even acknowledge, let alone consider, in its "quantification" analysis the psychological influence a defendant's presence would have had on the jury.

The Ninth Circuit's narrow inquiry was particularly erroneous given that the jury requested to hear the testimony of the critical witness for the prosecution yet another time, and reached its verdict within two hours of the conclusion of the readback. If the Ninth Circuit had engaged in the proper analysis, it surely would have found that the readback seriously affected the jury's verdict. *See Ware*, 376 F.2d at 721 (Schnackenberg, J., dissenting) ("[T]he rereading of certain portions of this trial testimony must have had some bearing on the jury's verdict, otherwise why would it specifically have requested this information?") Defendant's absence from the readback denied him not only the due process right to participate even in a limited way at the readback, it also denied him his Sixth Amendment confrontation right. (*See* discussion *supra* at 17.) This significant error was wholly ignored by the Ninth Circuit. In this case, the prejudice from defendant's absence was coupled, of course, with prejudice from the absence of the judge at the readback, whose absence, likewise, was not considered in the quantification of the prejudicial effect of the error.

Hegler II is not simply an aberration. Since *Brecht*, the Ninth Circuit has routinely adopted such a narrow harmless error analysis, one inconsistent with *Brecht's* mandate to assess the error in the context of all of the other evidence in the case. *See, e.g., Lee v. Marshall*, 42 F.3d 1296, 1298 (9th Cir. 1994) (harmlessness of error determined by post-trial testimony of police officers who replayed tape for jury in

absence of defendant and who denied any improper conduct). Without this Court's intervention it is clear that the Ninth Circuit, and very likely other lower courts, will continue to misapply the harmless error standard announced in *Brecht*.

B. This Court Should Clarify Whether the State or the Habeas Petitioner Has the Burden of Proof at an Evidentiary Hearing.

In addition to failing to review the entire trial record, the Magistrate Judge mistakenly placed upon Petitioner Hegler the burden of proving at the evidentiary hearing that the court reporter's readback of Ms. Thomas' trial testimony was tainted either by an omission of testimony or by improper voice inflection or emphasis. The Magistrate Judge repeatedly emphasized that she interpreted this Court's decision in *Brecht* to have shifted the burden of proof to petitioners in habeas cases, and expressly based her conclusion in this case — that the error was harmless — on her finding that Petitioner Hegler had failed to carry his burden. (Appendix 28a.) Both the District Court and the Ninth Circuit tacitly approved of the Magistrate Judge's allocation of the burden of proof to Petitioner Hegler.

This Court's precedents, however, required the courts below to place the burden on the State to prove that the court reporter properly read back Ms. Thomas' trial testimony. *See, e.g., Chapman v. California*, 386 U.S. 18, 24 (1967) (recognizing with approval that "the original common-law harmless-error rule put the burden on the beneficiary of the error [here, the State] . . . to prove that there was no injury") (citing 1 J. Wigmore, Evidence § 21 (3rd ed. 1940)). *See also O'Neal v. McAninch*, ____ U.S. ____, 115 S. Ct. 992 (1995) (risk of doubt as to harmlessness of error placed on State). In reversing the Sixth Circuit, the Court in *O'Neal* explained that in that case (a challenge to a jury instruction), framing the issue in terms of burdens of proof

was not conceptually accurate since the trial judge there was not concerned with controlling the presentation of evidence but with review of an established record. *See id.* at 994-95. In such cases, the trial judge should simply consider whether the error substantially influenced the jury's decision in light of the entire record; when the court has a "grave doubt" that the error was harmless, relief must be granted to the petitioner. *Id.* at 995. This Court made it clear, however, that despite some misleading language in its opinion, *Brecht* had not shifted a burden of proof onto petitioners, as the Sixth Circuit had assumed. *Id.* at 995-96. Thus, in *O'Neal*, this Court implicitly recognized that when a court must hold a post-trial evidentiary hearing in order to rule on a petition for habeas corpus, the State has the burden of proof on any factual matter at issue in the evidentiary hearing.

In this case, the factual matter at issue was whether or not the court reporter's readback was prejudicial. Contrary to this Court's authority, however, the courts below placed the burden of proof on this issue on Petitioner Hegler, finding that *he* had not demonstrated that there was either an omission in the court reporter's readback of Ms. Thomas' testimony or any improper voice inflection or emphasis on her part. This was plain error, as the State should have borne the burden of proof on this issue. Indeed, only after this factual issue had been resolved with the aid of allocated burdens of proof, would it have been proper for the judge to ask the legal question enunciated in *O'Neal* — *i.e.*, whether, in light of the entire record, Petitioner Hegler's absence during the readback had an impact on the jury's decision. *See* 115 S.Ct. at 995.

In sum, in this case, the burden of proof was improperly shifted to Petitioner Hegler at the evidentiary hearing. The Ninth Circuit, however, not only ignored this grave error, but adopted it, even after petitioner's counsel brought *O'Neal* to the Ninth Circuit's attention. Not only is the

Ninth Circuit's decision in this case in direct contravention of this Court's authority, it is clear that *O'Neal* has not clarified the issue for the lower courts.[8] Accordingly, this case presents the Court with an opportunity to clarify, as it should, the harmless error analysis that must be applied when an evidentiary hearing is required to resolve habeas corpus petitions.

---

[8]The Ninth Circuit expressly acknowledged its uncertainty in *Riley v. Deeds*, 56 F.3d 1117, 1119 n.3 (9th Cir. 1995) ("it may be the state's burden to show the absence of prejudice") (citing *O'Neal*).

CONCLUSION

For the foregoing reasons, Petitioner Hegler prays that the Court issue a writ of certiorari to review the Opinion and Judgment below.

DATED: October 10, 1995.

Respectfully submitted,

CHARLES G. BAKALY, III
(Counsel of Record)
103 Oronoco Street, Suite 200
P.O. Box 26356
Alexandria, Virginia 22313
(703) 706-0038

CHARLES G. BAKALY, JR.
521 Michigan Boulevard
Pasadena, California 91107
(818) 564-0033

JAMES R. ASPERGER
DEBRA L. BOYD
MICHAEL C. LEVINE
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071
(213) 669-6000

Attorneys for Petitioner

APPENDIX

JAMES EDWARD HEGLER,
Petitioner-Appellant,
v.
ROBERT G. BORG, Warden, DAN LUNGREN,
Respondents-Appellees,
No. 94-55450.
United States Court of Appeals, Ninth Circuit.
Argued and Submitted Feb. 7, 1995.
Decided March 27, 1995.

Charles G. Bakaly, III, Morgan, Lewis & Bockius, Los Angeles, CA, for petitioner-appellant.

Frederick C. Grab, Deputy Atty. Gen., Los Angeles, CA, for respondents-appellees.

Appeal from the United States District Court for the Central District of California.

Before: TROTT, FERNANDEZ, and T.G. NELSON, Circuit Judges.

TROTT, Circuit Judge.

OVERVIEW

California state prisoner James Edward Hegler appeals the district court's decision to dismiss his 28 U.S.C. § 2254 petition for writ of habeas corpus challenging his conviction and sentence for murder. Hegler contends the district court erred by treating the violation of his derivative Sixth Amendment constitutional right to be present at the reading of trial testimony to the jury during deliberations as a harmless "trial error," rather than a "structural error." We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

BACKGROUND

1. *The Law*

The United States Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), divided the class of constitutional errors that may occur during the course of a criminal proceeding into two categories: trial error and structural error. Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310, 111 S.Ct. at 1265. Accordingly, where a criminal proceeding is undermined by a structural error the, "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence," and the defendant's conviction must be reversed. *Id.* Trial error, on the other hand, is error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Id.* at 307-08, 111 S.Ct. at 1263-64.

Until recently, federal courts applied the *Chapman* harmless error standard to all criminal convictions tainted by trial error. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under this test "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24, 87 S.Ct. at 828. While the *Chapman* standard remains applicable to criminal convictions challenged on direct appeal, the Supreme Court recently declared that a less strict standard is appropriate when a state criminal conviction is attacked collaterally. *See Brecht v. Abrahamson*, ___ U.S. ___, ___-___, 113 S.Ct. 1710, 1721-22, 123 L.Ed.2d 353 (1993). Thus, in *Brecht* the Supreme Court held that a habeas petitioner is not entitled to relief unless the record demonstrates the trial error " 'had substantial and injurious effect or influence in

determining the jury's verdict.' " *Id.* at ____, 113 S.Ct. at 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)).

2. *Facts and Prior Proceedings*

Hegler was charged with first degree murder in the shooting death of Kerry James during an illegal drug transaction. At trial, Jeanetta Thomas provided key testimony linking Hegler to the murder. After the jury began its deliberation, the jurors asked to hear Thomas's testimony again. Because Hegler's attorney had explicitly declined the opportunity, neither Hegler nor his attorney were present when the court reporter read the testimony to the jury. The jury returned a guilty verdict.

The California Court of Appeal affirmed Hegler's conviction for first degree murder, and the California Supreme Court denied Hegler's petition for review. Having exhausted his state law remedies, Hegler then filed a petition for writ of habeas corpus in federal district court. The district court dismissed the petition, and Hegler appealed.

In *Hegler v. Borg* ("*Hegler I*"), 990 F.2d 1258 (9th Cir. 1993), a panel of this court determined Hegler had not waived his right to be present during the reading of the trial testimony, and his absence from that proceeding was constitutional error. The court further determined that "there is nothing in the record to overcome the presumption that the error was prejudicial." *Id.* at 1258. Accordingly, the panel remanded "for further proceedings to determine if the error was harmless," and warned that the "state must carry its burden [to show harmless error beyond a reasonable doubt] or the writ must issue." *Id.* The *Hegler I* decision was filed on April 6, 1993. On April 21, 1993, the Supreme Court filed *Brecht v. Abrahamson*, ____ U.S. ____, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), wherein the Court an-

nounced a new harmless error standard for determining when a habeas petitioner is entitled to relief.

3. *The District Court Decision*

On remand, the district court held an evidentiary hearing[1] to assess whether the constitutional error affected the jury's verdict. The district court examined the court reporter who at trial was responsible for reading back the testimony to the jury. The court reporter explained she was trained to read back testimony without using inappropriate voice inflection, word emphasis, facial expression, or body language; however, she stated she had no independent recollection of reading back testimony during Hegler's trial. She demonstrated her technique to the district court by reading, from her stenographic notes, a portion of the trial testimony. The district court noted that the court reporter conducted the readback in a professional style, and found her to be a credible witness. Although the court reporter made two errors during the readback demonstration, the district court observed that at the time the testimony was read to the Hegler jury, a trial transcript was not available and Hegler therefore would have been unable to detect such errors.

The district court also examined four of the jurors. Each juror recalled that the court reporter's readback was professional and that the substance of the readback was not materially different from the actual testimony of the witness during trial.

The district court held that the evidence did not warrant the grant of habeas relief. The district court declined Hegler's invitation to construe the constitutional error as

---

[1]The evidentiary hearing was conducted by the Honorable Carolyn Turchin, Magistrate Judge. Because the district court adopted the magistrate judge's findings, conclusions, and recommendations, we refer to the court as the district court.

structural error. The district court concluded that the law of the case doctrine precluded a determination inconsistent with *Hegler I's* implicit characterization of the constitutional error as trial error.

Applying the standard announced by the Supreme Court in *Brecht,* the district court found that the record did not demonstrate that the trial error had a substantial and injurious effect or influence in determining the jury's verdict. While acknowledging that *Hegler I* instructed the district court to determine whether the trial error was harmless beyond a reasonable doubt, the district court nevertheless concluded that *Brecht* was the proper standard to employ because it represented an intervening change in the law which excused the application of the law of the case doctrine. Accordingly, the district court entered judgment dismissing Hegler's petition for prejudice.

STANDARD OF REVIEW

The decision whether to grant or deny a petition for habeas corpus is reviewed de novo. *Sanders v. Ratelle,* 21 F.3d 1446, 1451 (9th Cir. 1994). "To the extent it is necessary to review findings of fact, the clearly erroneous standard applies." *Thomas v. Brewer*, 923 F.2d 1361, 1364 (9th Cir. 1991).

DISCUSSION

Hegler argues the district court erred by failing to classify the violation of his "presence right" as structural error. The government claims the district court correctly concluded it was foreclosed from considering the nature of the constitutional error because a panel of this court in *Hegler I* implicitly categorized Hegler's absence as trial error. Similarly, the government contends the law of the case doctrine precludes our reconsideration of the panel's decision.

1. *The Law of the Case*

"Under the law of the case doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) (internal quotations and brackets omitted). Although an appellate panel's observance of the doctrine is discretionary, a prior decision should be followed unless (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial. *Id.* The doctrine, however, applies only to issues considered and actually decided by the first court. *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995). "Although the doctrine applies to a court's explicit decisions as well as those issues decided by necessary implication, it clearly does not extend to issues an appellate court did not address." *Id.* (citation and internal quotations omitted).

Applying these principles, we think it would be inappropriate to accord binding effect to the panel's decision in *Hegler I*. The panel grounded its conclusion on an analysis that neither acknowledged nor discussed the trial error, structural error dichotomy. There is no assurance the panel considered the nature of the error in question before directing the district court to apply the harmless error standard. In light of this uncertainty, consideration of Hegler's argument is warranted.

2. *Structural Error Analysis*

The Supreme Court "has recognized that most constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306-07, 111 S.Ct. at 1262-63 (listing examples of trial error). Only in those limited cases where the constitutional deprivation affects "the framework within which the trial pro-

ceeds," is the integrity of trial process so compromised that the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Id.* at 310, 111 S.Ct. at 1265. Certain constitutional violations, however, will always invalidate the conviction. *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n. 8, 104 S.Ct. 944, 950-51 n. 8, 79 L.Ed.2d 122 (1984) (violation of the right to self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S.Ct. 792, 796-97, 9 L.Ed.2d 799 (1963) (the total deprivation of the defendants right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 531-32, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927) (trial by a biased judge); *Sheppard v. Rees*, 909 F.2d 1234, 1237-38 (9th Cir. 1989) (denial of the right to be informed of the nature and cause of the criminal accusation).

Hegler argues that the constitutional deprivation he suffered fits within that class of cases which can never be analyzed for harmless error. The characterization, however, is contrary to the Supreme Court's discussion in *Fulminante*. Indeed, the Court cited with approval to *Rushen v. Spain*, 464 U.S. 114, 117-18 & n. 2, 104 S.Ct. 453, 454-55 & n. 2, 78, L.Ed.2d 267 (1983), in support of the proposition that the denial of a defendant's right to be present during criminal proceedings can be trial error. *Fulminante*, 499 U.S. at 306-07, 111 S.Ct. at 1262-63.

In *Rushen*, the Supreme Court held to be harmless a trial judge's *ex parte* communication with a juror. *Rushen*, 464 U.S. at 117-19, 104 S.Ct. at 454-56. Although the petitioner asserted that his right to be present at critical trial proceedings and his right to counsel had been violated, the Court observed that "[t]hese rights, as with most constitutional rights, are subject to harmless error analysis, . . . unless the deprivation, by its very nature, cannot be harmless." *Id.* at 118 n. 2, 104 S.Ct. at 455 n. 2 (citations omitted). The Court warned that the idea an *ex parte* communication "can

never be harmless error ignores [the] day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice." *Id.* at 119, 104 S.Ct. at 456.

Thus, *Fulminante* and *Rushen* require us to consider the nature of a "presence error" in the context of the specific proceeding from which the defendant was excluded. In the usual case, such an error will be susceptible to harmless error analysis, but a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal.

In this circuit we have identified two critical phases of a criminal proceeding where the defendant's absence constitutes structural error. In *Hays v. Arave*, 977 F.2d 475 (9th Cir. 1992), we held that *in absentia* sentencing is a structural error that requires automatic reversal of the defendant's conviction, and in *Rice v. Wood*, 44 F.3d 1396 (9th Cir. 1995), we concluded that a defendant's absence from the return of a death verdict is a structural defect in the criminal proceedings that is not subject to harmless error analysis. Both *Rice* and *Hays* are distinguishable from the present case.

Our decision in *Hays* rested on the ability of the defendant to "affect[ ] each and every aspect of that crucial phase of his criminal adjudication." *Hays*, 977 F.2d at 479. Because of the potential for the defendant's presence to influence the course of the sentencing proceeding, we found it impossible to quantify the impact of the defendant's absence. *Id.* at 480-81. Finally, we concluded that "unconstitutional *in absentia* sentencing cannot be affirmed on the basis of harmless error [ ] because the right to be present at one's sentencing proceedings is a 'fundamental' one." *Id.* at 481.

We relied on our reasoning in *Hays* to determine the nature of the error presented in *Rice*. Again, the determinative factor was the defendant's ability to affect the proceeding that occurred in his absence: "[I]t was critically important that the return of the death verdict and the polling of the jurors take place in Rice's presence, where each juror would have to look Rice in the eye and reaffirm his or her jury room vote by declaring in open court that Rice did not deserve to live." *Rice*, 44 F.3d at 1402. We also noted that like the right to be present at sentencing, the right of the defendant to be present during the return of a death verdict is fundamental. *Id.*

In contrast to the constitutional error that infected the criminal proceedings in *Hays* and *Rice*, Hegler's absence from the reading of trial testimony did not render the trial process defective. Because the purpose of the proceeding from which Hegler was excluded was to allow jurors to hear again testimony given at trial, the ability of Hegler to influence the process was negligible. The only role Hegler could have played, had he been present, was as an observer. *See id.* at 1405 (Wallace, C.J., concurring in part and dissenting in part) (suggesting that where defendant has no role to play his absence does not constitute structural error). The witness whose testimony was being read was also absent, and thus the right of confrontation from which the right of presence is derived in this context, *see Bustamante v. Eyman*, 456 F.2d 269, 273 (9th Cir. 1972), had ceased to be germane. Admittedly, Hegler could have objected to inaccuracies in the readback[2], or protested against any impropriety on the court reporter's part; but any mistake or lapse that may have tainted the jury's decision is capable of being quantified and assessed in an evidentiary hearing. *See*

---

[2]Hegler's ability to perform even this limited function is doubtful given the fact that at the time of the readback no trial transcript yet existed.

Rushen, 464 U.S. at 119, 104 S.Ct. at 456 (prejudicial effect from the violation of a defendant's right to be present at trial can be determined by a post-trial hearing). In other words, any harm stemming from the violation of Hegler's right to be present during the prosaic reading of the trial testimony is susceptible to harmless error analysis. *Cf. Lee v. Marshall*, 42 F.3d 1296, 1298-99 (9th Cir. 1994) (an intrusion into the jury process normally should be analyzed for its prejudicial impact upon the jury deliberations (citing *United States v. Olano*, ___ U.S. ___, ___, 113 S.Ct. 1770, 1780, 123 L.Ed.2d 508 (1993))).

Nor was Hegler's right to be present at the readback "fundamental." The immediate purpose of the proceeding was to let the jury hear for a second time the testimony of a witness; the reading was in all material aspects a sterile event. The jury's attention was directed not at the defendant, but at the absent witness's sworn testimony. In short, the defendant's presence at such a proceeding is unlikely to reap the "gains both symbolic and practical" that inure to the defendant and society from a "public pronouncement . . . which is tailored to the defendant and delivered in his presence." *Hays*, 977 F.2d at 481.

In sum, we think that before a court can classify a "presence error," the character of the proceeding from which the defendant was excluded must be evaluated to ascertain the impact of the constitutional violation on the overall structure of the criminal proceeding. In so doing, we conclude that where, as here, the deprivation occurred during a proceeding in which the defendant had little ability to influence its outcome, and the harm that resulted from the defendant's absence can be quantified, the constitutional error is a trial error, amenable to harmless error analysis.

3. *Harmless Error Analysis*

After the Supreme Court's decision in *Brecht*, a habeas petitioner who challenges a conviction on the basis of a trial error is entitled to relief only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, ___ U.S. at ___, 113 S.Ct. at 1722 (internal quotations omitted). Hegler argues that in his case we should apply the more onerous *Chapman* standard and require the government to show the trial error was harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24, 87 S.Ct. at 828. Hegler contends the panel's decision in *Hegler I* directing the district court to apply the *Chapman* standard to Hegler's case is binding precedent under the law of the case doctrine. We disagree.

The *Hegler I* decision was handed down before *Brecht* was filed. We must apply intervening Supreme Court authority to a subsequent appeal, *United States v. Lancellotti*, 761 F.2d 1363, 1366-67 (9th Cir. 1985), and an exception to the law of the case doctrine acknowledges this reality, *Merritt*, 932 F.2d at 1320. Accordingly, we will review the trial error that occurred during Hegler's state criminal proceedings under the *Brecht* harmless error standard. *See Brecht*, ___ U.S. at ___ - ___, 113 S.Ct. at 1713-23 (explaining why the *Chapman* standard applies only to direct appeals and not to collateral review).

Our task then is to determine "what effect the error had or reasonably may be taken to have had upon the jury's decision. *Id.* at ___, 113 S.Ct. at 1724 (Stevens, J., concurring) (quoting *Kotteakos*, 328 U.S. at 764, 66 S.Ct. at 1247). Only if the record demonstrates the jury's decision was substantially influenced by the trial error or there is " 'grave doubt' about whether an error affected a jury in this way" will Hegler be entitled to habeas relief. *O'Neal v. McAninch*, ___ U.S. ___, ___, 115 S.Ct. 992, 995, 130 L.Ed.2d 947 (1995).

Our review of the record convinces us that Hegler was not prejudiced by his absence from the readback of trial testimony to the jurors. The evidentiary hearing conducted by the district court established that the court reporter read the testimony without inappropriate inflection or comment, and that the substance of the readback was not materially different from the witness's testimony at trial. Indeed, there is *no* evidence indicating there was *any* improper conduct during the reading of the testimony to the jury. Under these circumstances, a habeas petitioner is not entitled to relief. *See Lee*, 42 F.3d at 1298-99 (intrusion into jury room by police officers is harmless error under *Brecht* where there is not evidence the jury was improperly influenced); *cf. Bustamante v. Cardwell*, 497 F.2d 556, 557-58 (9th Cir. 1974) (where evidentiary hearing established that nothing prejudicial occurred during the defendant's absence from the replaying of taped jury instructions error was harmless beyond a reasonable doubt).

Accordingly, we affirm the district court's decision to deny the petition for writ of habeas corpus and to dismiss the action with prejudice.

AFFIRMED.

NOT FOR PUBLICATION

No. 94-55450

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EDWARD HEGLER,
Petitioner-Appellant,
v.
ROBERT G. BORG, Warden; DAN LUNGREN,
Respondents-Appellees.

D.C. No. CV-91-05734-DWW

Filed
July 14, 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

ORDER

Before: TROTT, FERNANDEZ, and T.G. NELSON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Accordingly, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

NOT FOR PUBLICATION

No. 94-55450

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EDWARD HEGLER,
Petitioner-Appellant,

v.

ROBERT G. BORG, Warden; DAN LUNGREN,
Respondents-Appellees.

D.C. No. CV-91-05734-DWW

Filed
June 2, 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

ORDER

Before: TROTT, FERNANDEZ, and T.G. NELSON,
Circuit Judges.

For the purpose of filing and considering appellant's petition for rehearing and suggestion for rehearing en banc received May 9, 1995, the mandate is ordered recalled.

The petition and suggestion shall be circulated to the entire court.

SO ORDERED.

No. CV 91-5734-DWW(CT)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD HEGLER,
Petitioner,
v.
ROBERT BORG, Warden, and
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents.

Filed
Clerk, U.S. District Court
January 31, 1994
Central District of California

JUDGMENT

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the petition is denied and the action is dismissed with prejudice.

DATED: January 31, 1994

/s/ DAVID W. WILLIAMS
David W. Williams
United States District Judge

No. CV 91-5734-DWW(CT)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD HEGLER,
Petitioner,
v.
ROBERT BORG, Warden, and
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents.

Filed
Clerk, U.S. District Court
January 31, 1994
Central District of California

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed all of the records and files and the attached report and recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's report and recommendation.

IT IS ORDERED that Judgment be entered denying the petition and dismissing the action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's report and recommendation and the Judgment in this matter by United States mail on petitioner and counsel for respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: January 31, 1994

/s/ DAVID W. WILLIAMS
David W. Williams
United States District Judge

I have carefully read and considered the findings of M/J Turchin and adopted them.

1/31/94 /s/ D.W.W.

No. CV 91-5734-DWW(CT)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD HEGLER,
Petitioner,
v.
ROBERT BORG, Warden, and
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents.

Filed
Clerk, U.S. District Court
January 5, 1994
Central District of California

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This report and recommendation is submitted to the Honorable David W. Williams, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

INTRODUCTION

This is a report and recommendation following a remand to the district court by the Ninth Circuit Court of Appeals (the Ninth Circuit). The Ninth Circuit's unpublished Memorandum Opinion reversing and remanding the district court's denial of the petition for a writ of habeas corpus in this case is attached as exhibit 1. The magistrate judge's original report and recommendation, which recommends denying the petition and preceded the district court's judgment and the Ninth Circuit's Memorandum Opinion, is

attached as exhibit 2. For the reasons set forth below, and after a careful examination of the record, the magistrate judge respectfully recommends that the petition be denied.

Petitioner is a state prisoner who is represented by counsel appointed after this matter was remanded. At the conclusion of the trial in the underlying state case, and in petitioner's presence, the trial judge asked "if counsel will stipulate if the jury wishes to hear anything read that the reporter may go in with the bailiff and read to the jury?" Both defense counsel and the prosecutor stipulated, however, petitioner personally neither objected nor assented to this procedure because he wasn't asked. (RT 751).[1]

Petitioner essentially raises the issue of whether his absence from the proceedings, at the time the trial testimony of a prosecution witness was read back to the jury during deliberations by a court reporter, pursuant to the stipulation of counsel, requires the grant of his habeas corpus petition because petitioner himself did not personally waive his or his counsel's presence.[2]

Petitioner's conviction for first-degree murder was affirmed by the California Court of Appeal which concluded, as to this issue, that "[t]here is no merit to appellant's contention that, before accepting his attorney's waiver of the right to be present during reading of the testimony to the jury, the trial court was required to ascertain that appellant had made a knowing and intelligent waiver of this right. Defense counsel is generally authorized to make tactical

---

[1] "CT" refers to the clerk's transcript. "RT" refers to the reporter's transcript of the trial proceedings. "RTE" refers to the reporter's transcript of proceedings at the September 21, 1993, federal court evidentiary hearing in this matter. Each transcript reference will be followed by the relevant page number(s).

[2] A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

decisions regarding introduction of evidence and to control court proceedings without the necessity of first obtaining a personal waiver from his client." (citations omitted) (Return, exh. A at 10-11). The California Supreme Court denied his petition for review.

Following proceedings on the petition filed in this court, the Ninth Circuit found that the trial court erred by not obtaining petitioner's waiver and that there is nothing in the record to overcome the presumption that the error was prejudicial. The matter was remanded for further proceedings to determine if the trial court error was harmless. The Memorandum Opinion instructs that respondent "carries the burden of proving harmless error beyond a reasonable doubt." (Memorandum Opinion at 2,4).

The Memorandum Opinion remanding this case was filed on April 6, 1993. On April 21, 1993, the United States Supreme Court decided *Brecht v. Abrahamson*, ____ U.S. ____, 113 S.Ct. 1710 (1993), a significant intervening decision with respect to the test for harmless error. The Memorandum Opinion in this case appears to be premised on the applicability of the harmless error test set forth in *Chapman v. California*, 386 U.S. 18 (1967). Under *Chapman*, which involved a case on direct appeal, the burden is upon the government to demonstrate that constitutional error is "harmless beyond a reasonable doubt." *Id.* at 24. While the same harmless error standard has been previously applied on collateral review, *Brecht* instructs that the *Chapman* test does not apply in habeas corpus cases. Instead, on collateral review of trial error, the burden is upon the habeas petitioner to demonstrate that the error had "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 1722 (quotation omitted); *Standen v. Whitley*, 994 F.2d 1417, 1423 (9th Cir. 1993), *cert. denied*, *Whitley v. Standen*, 126 L.Ed 2d 478 (1993).

After the parties filed briefs on this and other issues, an evidentiary hearing was held on September 21, 1993. On November 9, 1993, respondent filed a post-hearing memorandum. On November 23, 1993, petitioner filed a post-hearing memorandum.

SUMMARY OF TRIAL FACTS

In the fall of 1984, Kerry James (the victim) parked his car near an apartment complex in the City of Los Angeles and attempted to purchase narcotics from two men standing in an adjacent driveway. A dispute arose during the transaction and the victim was shot as he went back to his car. He drove a short distance away and died of a gunshot wound consistent with a shot from a .38 caliber firearm. Cocaine was found in his body, and there was an abrasion on his arm. (Return, exh. A; RT 81-82, 87, 349). Petitioner was arrested approximately one week later in front of the same apartment complex on unrelated charges. (RT 462, 609-629).

The prosecution called nine witnesses and the defense called four. Three of the witnesses called by the prosecution were in the vicinity of the shooting at the time it occurred, however, no one testified that she actually saw petitioner shoot the victim. The testimony of one of these witnesses, Jeanetta Thomas, is the testimony that was read back to the jury by the court reporter.

Ms. Thomas, who was in front of the apartment complex dealing rock cocaine on the night of the murder, and who had previously sold some of this substance to the victim, identified petitioner in court as someone she had known for approximately a year as "J-Stone." She said J-Stone was one of two men standing in the driveway from which the shooting occurred. She said that J-Stone had on a white T-shirt with short sleeves and she could see his arms. She said that his companion had on a long-sleeved black jacket.

Ms. Thomas testified she watched and heard the beginning of a purported narcotics transaction between J-Stone and the victim, who had approached the two men, and then she saw the victim get pushed up against a fence. The victim started to go back to his car. Then she saw a portion of a bare arm stick out from the location of the driveway, heard a gunshot, and saw the spark from the gun as it was fired. She did not see the face of the person with the gun in his hand and she subsequently heard a second shot. Ms. Thomas was 17 years old and pregnant at the time of these incidents and she had free-based cocaine earlier that evening. (RT 43-74, 101-159).

At trial, the other two witnesses, both of whom were friends of the petitioner, recanted their previous statements and denied either seeing or hearing the shooting. One of these witnesses, Keely Cunningham, had provided the police with a signed statement, as well as a tape-recorded statement, which placed petitioner at the murder scene with a gun. She said she lied to police officers when she told them petitioner carried a .38 (caliber firearm), she repudiated the information in the signed statement and denied that it was her voice on the tape recording which was played for the jury and authenticated by a police officer. (RT 172, 201-222, 233-239, 264). While she acknowledged that the voice on the tape recording said petitioner said "I got him" after the shooting took place, she continued to deny that it was her voice on the tape. (RT 265). She also recanted similar testimony at the preliminary hearing. (RT 273).

Petitioner put on an alibi defense. His alibi witness, who uses several aliases and was in custody on pending cocaine charges at the time he testified, said that he and petitioner, an individual he knows as J-Stone, were at a Fat Burger fast food restaurant together at the time of the murder. Petitioner's alibi witness further testified that he believes that petitioner was in jail in the Crip Module when the witness

learned petitioner had been arrested for murder. (RT 424-461). Petitioner also testified that he was at the Fat Burger fast food restaurant at the time of the murder. (RT 462-533). While he initially testified that he "can't say" whether it was Ms. Cunningham's voice on the tape recording made by the police, he later testified that it was her voice. (RT 536, 565).

SUMMARY OF FACTS ADDUCED AT THE EVIDENTIARY HEARING

Katherine Parker-Rijke is the certified shorthand reporter (CSR) who read back Ms. Thomas' testimony to the trial jury in October 1985. She passed the CSR examination in November 1974. In 1979, she and another CSR developed the curriculum and authored the textbooks for a note reading school and she taught at that school for five years. In 1983, she returned to court reporting on a part-time basis. She has been working full-time as a court reporter for the Los Angeles Superior Court since April 1985. (RTE 18-20).

Part of her CSR training involved readback and she also received guidelines for readback during her Los Angeles Superior Court orientation. She learned that she should take the time, prior to reading testimony back to a jury, to go through her stenographic notes and mark all the spots that should not be read to the jury such as sustained objections, sidebar conferences, and any other proceedings which occurred outside the presence of the jury. (RTE 20-23). Her understanding of the way she is to read back testimony, which comports with her practice throughout her career, is that she is to use a monotone voice. She considers it absolutely inappropriate to use voice inflection, word emphasis, facial expression or body language and she has not ever done so during her career as a court reporter. (RTE 23-24).

While Ms. Parker-Rijke recalled being one of the reporters at petitioner's 1985 trial, she had no independent recollection of reading back testimony in that case. However, she knows that she did so based on her log and notes. (RTE 24). Ms. Parker-Rijke demonstrated her readback style by reading from her stenographic notes, rather than the transcript, of small portion of Ms. Thomas' testimony. Ms. Parker-Rijke testified that she marked her notes with a green line to indicate where she actually began her readback. (RTE 30-31).

The magistrate judge carefully observed Ms. Parker-Rijke during her testimony, including the readback demonstration, and found her to be a completely credible witness. Her demeanor is best described as professional and she speaks clearly and in a monotone without emphasizing one word over another. Her facial expressions and body language suggested nothing other than attention to her task. However, a comparison between the trial transcript and the transcript of readback demonstration portion of the evidentiary hearing, prepared by the court reporter who reported the evidentiary hearing, reflects that Ms. Parker-Rijke said the word "and" on one occasion where the trial transcript reflects a comma (RTE 33 at line 6; RT 44 at line 14), and said the word "proximate" on one occasion where the trial transcript reflects the word "block." (RTE 34 at line 15; RT 5 at line 15). Ms. Parker-Rijke also testified that she did not know when she did the trial readback whether she may have omitted a sentence or paragraph of the testimony. (RTE 38).

Respondents also called four of the jurors who sat on the jury which convicted petitioner at the federal court evidentiary hearing. While each juror recalled the trial and the fact of the readback, the jurors' individual recollections differed as to the length of the readback and they didn't presently recall what was read. However, each juror witness recalled

that the court reporter's readback was professional, mechanical and without undue emphasis or inflection of any kind. The juror witnesses used terms such as "mechanical, like a robot, flat, dry, professional, monotone" to describe the readback. (RTE 44, 52, 56, 62). Additionally, each of the four juror witnesses testified that his or her recollection is that the testimony that was reread was not materially different from the testimony at the time the witness testified. (RTE 45, 47, 54, 60, 63).

Petitioner testified that he did not object to his counsel's stipulation concerning readback of testimony because he didn't know he could and the bailiff told him that if the jury wanted any testimony reread, the bailiff would bring petitioner back into the courtroom. He also testified that he thought another attorney would be present if there was readback. He didn't know what that attorney would do for him although he speculates that the attorney could ask the jurors if they wanted additional testimony reread. He said it was his understanding that although his trial attorney stipulated that the trial attorney need not be there if a reread took place, petitioner would be present. (TR 68-72).

PETITIONER'S CONTENTIONS

Petitioner contends that the writ should issue in this case because he was not present and he did not waive his right to be present when the testimony of prosecution witness Jeanetta Thomas was readback to the jury during its deliberations. He essentially makes the following claims in support of this contention:

1. Notwithstanding the Ninth Circuit's opinion in this case, which remanded this matter to determine whether the trial court error was harmless, the error was "structural"

error which requires automatic reversal and is not susceptible to harmless error analysis; and,

2. The trial court error was not harmless.

DISCUSSION

1. Distinction Between Structural and Trial Error

Prior to the Ninth Circuit's Memorandum Opinion in this case, the United States Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279 (1991) distinguished between two possible types of constitutional error which may occur during a trial. "Structural" error is destructive of the trial mechanism, such as the unlawful exclusion of members of a defendant's race from the jury. "Trial" error impacts constitutional rights without destroying the trial's structure, such as the admission into evidence of an involuntary confession. *Id.* at 309-10. If the challenged error in this case is considered a structural error, the court reporter's readback of the witness' testimony in this case cannot be neutralized by harmless error analysis.

The Memorandum Opinion in this case clearly instructs this court to conduct further proceedings "to determine if the error was harmless." (Memorandum Opinion at 4). Absent certain exceptions, which are inapplicable here, under the law of the case doctrine the Ninth Circuit's decision, which encompasses those issues decided by necessary implication, precludes this court from reexamining an issue previously decided by a higher court in the same case. *See Eichman v. Fotomat Corporation*, 880 F.2d 149, 157 (9th Cir 1989) (citations omitted). Moreover, it has previously been held that while the jury function of reviewing evidence in a case is properly viewed as a critical stage of the trial, the right of a criminal defendant to be present at all critical stages of the proceedings is subject to a harmless error analysis. *See, Rushen v. Spain*, 464 U.S. 114, 117-120

(1983); *United States v. Kupau*, 781 F. 2d 740, 743 (9th Cir.), *cert. denied*, 479 U.S. 823 (1986). Consequently, the magistrate judge concludes that the error at issue is amenable to harmless error analysis.

2. Harmless Error

As set forth above, under the law of the case doctrine, a court is ordinarily precluded from reexamining an issue previously decided by a higher court in the same case. There is "a well-established exception, however, which allows reexamination when 'controlling authority has made a contrary decision of law applicable to such issues.' " *Richardson v. United States*, 841 F. 2d 993, 996 (9th Cir.), amended on other grounds, 860 F.2d 357 (9th Cir. 1988) (quotation omitted).

The Memorandum Opinion in this case, remanding this matter for further proceedings and assigning respondent the burden of proving harmless error, was filed on April 6, 1993. On April 21, 1993, the United States Supreme Court decided *Brecht v. Abrahamson*, ____ U.S. ____, 113 S.Ct. 1710, (1993).[3] Under the harmless error test for trial error on habeas corpus review articulated in *Brecht*, habeas relief must be granted only if the trial error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 113 S.Ct. at 1722 (quotation omitted).

The *Brecht* test is retroactively applied. *Henry v. Estelle*, 993 F.2d 1423, 1427 n.2 (9th Cir. 1993). Moreover, because

---

[3]According to Rule 41 of the Federal Rules of Appellate Procedure, the mandate of the court issues 21 days after the entry of judgment. Thus, while *Brecht* was decided before the issuance of the mandate in this case, the 9th Circuit did not have the benefit of the *Brecht* opinion prior to filing its decision. Respondents took no affirmative action to bring the *Brecht* opinion to the attention of the Ninth Circuit after the Memorandum Opinion was filed.

it is controlling authority which bears on the harmless error test to be applied on remand in this case, the magistrate judge respectfully concludes that she should reexamine the harmless error test to be applied and apply the *Brecht* test under the exception to the law of the case doctrine set forth above.

Consequently, in this collateral review for trial error, the magistrate judge applied the *Brecht* test as she carefully reviewed the record of both the trial and evidentiary hearing and reflected "as to the probabilities of the effect of error on a reasonable trier of fact." *See, Standen v. Whitley*, 994 F. 2d at 1423 (quoting Roger Traynor, *The Riddle of Harmless Error*, 27 (1970)). Petitioner has not demonstrated that there was prejudicial contact between the court reporter and the jurors and the record of the evidentiary hearing reflects a readback devoid of the concerns enumerated in the Memorandum Opinion such as improper voice inflection and emphasis. While there is no way of knowing with any certainty whether the court reporter misspoke or omitted something when she readback Jeanetta Thomas' testimony, petitioner has not demonstrated that there was a material omission or misstatement, indeed the evidence is that there was not.[4] In addition to the testimony of the juror witnesses at the evidentiary hearing, a review of Ms. Thomas' trial testimony reveals that the gist of what she did and did not see and hear at the time of the murder for which petitioner was convicted is repeated on multiple occasions throughout her testimony. In the context of the trial record and the record of the evidentiary hearing, the

---

[4]The magistrate judge notes that the court reporter reread testimony to the jury (and at the evidentiary hearing 8 years later) from her stenographic shorthand notes, not from the trial transcript which was subsequently prepared. Thus, even if petitioner and his counsel had been present for the readback, they would not have had the transcript to compare to the testimony which was reread.

magistrate judge concludes that the trial error in this case did not have substantial and injurious effect or influence in determining the jury's verdict.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Court issue an order: (1) approving and adopting this report and recommendation; and (2) directing that judgment be entered denying and dismissing the petition with prejudice.

DATED: January 5, 1994

/s/ CAROLYN TURCHIN
Carolyn Turchin
United States Magistrate Judge

NOTICE: Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrates and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

NOT FOR PUBLICATION

No. 92-55497

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EDWARD HEGLER,
Petitioner-Appellant,

v.

ROBERT BORG, Warden,
Respondent-Appellee,

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent-Appellee.

D.C. No. CV-91-5734-DWW (CT)

Filed
April 6, 1993
Cathy A. Catterson, Clerk
U.S. Court of Appeals

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David W. Williams, District Judge, Presiding

Submitted March 23, 1993**

Before: WALLACE, Chief Judge, FARRIS and BRUNETTI, Circuit Judges.

The government argues that although Hegler and his lawyer were not actually in the jury room during the reread-

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

ing of testimony, Hegler was not denied his right to be present because he and his lawyer were in a nearby court room.[1] We reject the argument. A criminal defendant has the right to be "personally present in the courtroom at every stage of his trial . . . ." *Bustamante v. Eyman*, 456 F.2d 269, 271 (9th Cir. 1972). The replaying of taped testimony or rereading of transcripts "is more properly viewed as a stage of the trial at which the presence of the defendant is required." *United States v. Kupau*, 781 F.2d 740, 743 (9th Cir. 1986).

Hegler "had a right to be present when the tape was being played and this was a right which could not be waived by counsel." *Id. see also Bustamante*, 456 F.2d at 274. The court did not inform Hegler that he had a right to be present at the reread, nor did the court ask him if he waived this right. The fact that defense counsel stipulated to the reread procedure did not waive Hegler's right to be present without a showing that Hegler himself made a knowing and voluntary waiver.

Nonetheless, the district court held that the trial court's error was harmless. The government carries the burden of proving harmless error beyond a reasonable doubt. *Bustamante v. Cardwell*, 497 F.2d 556, 558 (9th Cir. 1974); *United States v. Brown*, 832 F.2d 128, 130 (9th Cir. 1987); *Aikins v. Cardwell*, 500 F.2d 47, 47 (9th Cir. 1974). "We cannot say that replaying taped evidence for the jury in the absence of the defendant, defense counsel, and the judge was harmless beyond a reasonable doubt." *Brown*, 832 F.2d at 130. In *Brown*, we explained that prejudicial contact between the case agent playing the tape and the jury "could be very subtle, such as a nod at a significant portion of the

---

[1] The parties disagree about whether Hegler and his counsel were even present in a nearby courtroom when the testimony was replayed. Because Hegler had a right to be present in the same room as the jury when it heard the evidence again, we need not resolve this dispute.

tape." *Id.* Although the Bailiff is a neutral party, "[i]n the absence of the protection afforded by the presence of defendants, and their counsel," we cannot say that no prejudicial contact occurred. *Id.*

The court reporter reread testimony from a transcript. The rereading of testimony entails greater risk of prejudice than merely replaying a tape. The court reporter may have improperly influenced the jury through voice inflection and emphasis. Such subtle influences "might have been unintended, or even unnoticed by the" court reporter herself. *Id.* Nor would such influences appear in a written transcript of the testimony.

United States v. Kupau, 781 F.2d at 743, is not to the contrary. In *Kupau*, we found that the trial court's "emphatic" cautionary instructions rendered the court's error harmless. *Id.*[2] The judge cautioned the jury not to ask the agent who replayed taped testimony any questions and stated that the agent was not to comment on any evidence. The record does not reveal that the trial court gave similar instructions. Nor did the court in *Kupau* permit the court reporter to reread testimony from a transcript to the jury. The government has not shown that this error, which entails much greater risk of prejudice than replaying a tape, was harmless.

---

[2] Although we stated in *Kupau* that the defendant's failure to object required the court to review his claim for plain error, we recognized that the defendant's right to be present could not be waived by counsel. *Kupau*, 781 F.2d at 743. We rejected the defendant's claim based on a harmless error analysis. *Id.* ("we similarly hold that the error was harmless beyond a reasonable doubt"). We held in *Bustamante* that unless the defendant personally waives his right to be present, the government carries the burden of proving that the error was harmless beyond a reasonable doubt. *Bustamante*, 456 F.2d at 274; *Bustamante*, 497 F.2d at 558.

In *Bustamante v. Cardwell*, 497 F.2d at 558, we held that it was harmless error for the trial court to replay taped instructions for the jury in the absence of the defendant. However, the defendant's attorney was present in the room where the instructions were replayed. The district court held an evidentiary hearing to determine whether the defendant had been prejudiced by his absence. The state produced strong evidence — including testimony from the defendant's former attorney — that the court's error had been harmless. *Id.* Hegler's attorney was not present to hear the testimony replayed or reread to the jury. Nor has the state produced other evidence that the error was harmless.

Thus there is nothing in the record to overcome the presumption that the error was prejudicial. *See Aikins*, 500 F.2d at 47. We reverse and remand for further proceedings to determine if the error was harmless. The state must carry its burden or the writ must issue.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD HEGLER,
Plaintiff,
v.
ROBERT G. BORG, Warden,
and DAN LUNGREN, Attorney General,
Defendants.

No. CV 91-5734-DWW(CT)

Filed
Clerk, U.S. District Court
February 20, 1992
Central District of California

JUDGEMENT

IT IS ADJUDGED that the petition is denied and the action is dismissed with prejudice.

DATED: February 20, 1992

/s/ DAVID W. WILLIAMS
David W. Williams
United States District Judge

No. CV 91-5734-DWW(CT)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD HEGLER,
Plaintiff.
v.
ROBERT G. BORG, Warden, and
DAN LUNGREN, Attorney General,
Defendants.

Filed
Clerk, U.S. District Court
February 20, 1992
Central District of California

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

IT IS ORDERED that: (1) the Report and Recommendation of the Magistrate Judge is approved and adopted; and (2) Judgment shall be entered denying the petition and dismissing the action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve forthwith a copy of this Order and the Judgment of this date on the petitioner and counsel for respondents.

DATED: February 20, 1992

/s/ DAVID W. WILLIAMS
David W. Williams
United States District Judge

No. CV 91-5734-DWW(CT)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD HEGLER,
Petitioner,
v.
ROBERT G. BORG, Warden, and
DAN LUNGREN, Attorney General,
Respondents.

Filed
Clerk, U.S. District Court
January 29, 1992
Central District of California

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Report and Recommendation is submitted to the Honorable David W. Williams, Senior United States District Judge, pursuant to the provisions of 28 U.S.C. Section 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

On October 12, 1985, petitioner was convicted of first degree murder with the use of a firearm. He was sentenced to state prison for twenty-five (25) years to life with a two (2) year enhancement for the weapons finding.

On October 23, 1991, petitioner filed his petition for writ of habeas corpus. On November 14, 1991, respondent filed a return. On December 4, 1991, petitioner filed a traverse.

CONTENTION

Petitioner claims he was denied the right to counsel and the right to be present when the testimony of a prosecution witness was re-read to the jury.

DISCUSSION

The jury function of reviewing the evidence in a case is properly viewed as a stage of the trial in which the presence of the defendant is required. *United States v. Kupau*, 781 F.2d 740, 743 (9th Cir. 1986), *cert. denied*, 479 U.S. 823 (1986). The rights of a person on trial are secured through the presence of counsel. *United States v. Cronic*, 466 U.S. 648, 653 (1984). However, the right to be present at all critical stages of proceedings and the right to be represented by counsel are subject to a harmless error analysis. *Rushen v. Spain*, 464 U.S. 114, 117-120 (1983).

In this matter, petitioner contends that neither he nor his counsel were present, and he did not waive his right to be present, when the court reporter re-read the testimony of a prosecution witness. Although the record appears to indicate that defendant's counsel and defendent were present at the time of the re-reading of the testimony (CT 326-27; RT 757-58),[1] respondent simply argues that error in this case, if any, was harmless.

In *United States v. Kupau*, 781 F.2d at 742-43, the Ninth Circuit held that the error in allowing the Federal Bureau of Investigation agent who was present at counsel table during trial to replay tapes to the jury during deliberation *alone and without a court reporter* was harmless beyond a reasonable

---

[1] "CT" refers to the Clerk's Transcript and will be followed by the relevant page number(s) of the transcript. "RT" refers to the Reporter's Transcript of Proceedings and will be followed by the relevant page number(s) of the transcript.

doubt. Since the defendant in *Kupau* did not object to the procedure at trial, the error was subject to a harmless error analysis. Similarly, the Ninth Circuit held the error to be harmless in a case where the jury was reinstructed at its request in the defendant's absence and without his knowledge. *Bustamonte v. Cardwell*, 497 F.2d 556, 558 (9th Cir. 1974).

In this case, not only was there an absence of an objection, but there was a stipulation by defense counsel that testimony of witnesses could be re-read to the jurors by the court reporter in the presence of the bailiff.

In his traverse, petitioner cites several cases in support of his proposition that he had a constitutional right to be present at the re-reading of the testimony to the jury. Most of these cases are factually inapposite to this matter. For example, in *Snyder v. Massachusetts*, 291 U.S. 97, 105-107 (1934) (distinguished on another ground in *Malloy v. Hogan*, 378 U.S. 1, 2-3 n.1 (1963)), the Supreme Court held that the defendant had *no* constitutional right to accompany the jury on a view and said "no where in this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence where presence would be useless or the benefit but a shadow." In *People v. McGraw*, 119 Cal. App. 3d 582, 594-95 (1981) the California Supreme Court held that the defendant was deprived of his constitutional right to assistance of counsel where his retained counsel did not assist or participate in the selection of the jury. In *People v. Conrad*, 31 Cal. App. 3d 308, 323-24 (1973), the court held that error, if any, was harmless beyond a reasonable doubt where the defendant did not personally waive his right to counsel or to be present and the deputy district attorney's opening statement was re-read to a new juror who was not present when the deputy district attorney presented his opening statement.

Petitioner correctly notes however that the Ninth Circuit has previously held that counsel cannot waive a defendant's right to be present when a tape recording was being replayed to a jury. *Bustamonte v. Eyeman*, 456 F.2d 269, 274 (9th Cir. 1972). In *Bustamonte*, the Court held that the state had not proved that defendant's absence during the replaying of a tape recording of the jury instructions to the jury was harmless. In *Bustamonte*, while the defendant was not present, defense counsel and the prosecutor were both present during the replaying of the tape of the jury instructions. In the instant case, if the prosecution witness's testimony was in fact re-read according to the in-court stipulation between counsel that provided that any testimony of witnesses could be re-read to jurors by the court reporter in the presence of the bailiff, neither counsel nor the defendant were present. Thus, in *Bustamonte*, the jury might have drawn the inference that the defendant had fled since counsel were present but the defendant was not. No such adverse inference could be drawn by the jury in this case. Furthermore, in the instant case, as respondent points out, the testimony which was re-read was transcribed. Therefore, it has been available for review at post-conviction proceedings for an analysis of whether or not the testimony re-read to the jury in the absence of defendant and his counsel prejudiced his case, weakened his defense or was otherwise harmful to his interest.

In *United States v. Brown*, 832 F.2d 128 (9th Cir. 1987), the Ninth Circuit held that it was reversible error for a tape recording that was a trial exhibit to be replayed for the jury in the absence of the defendant and his counsel and over the objection of defense counsel by the law enforcement agent who was the assigned case agent who had been seated at the prosecutor's table during the entire trial against the defendant. The court in *Brown* held that in light of defense counsel's objections to the procedures directed by the trial court, it constituted reversible error because the case agent

was not a neutral observer. Rather, the court opined that the case agent could have had prejudicial contact with the jury such as a nod at a significant portion of the tape. *Id.* at 130. However, in this case, not only did the defense counsel stipulate to the court reporter's re-reading of testimony at the jury's request, the court reporter is an individual associated with the court and not one party or another.

CONCLUSION

For the foregoing reasons, the Magistrate Judge finds that petitioner has not sustained his burden of demonstrating that his conviction was obtained in violation of his constitutional rights.

RECOMMENDATION

IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the petition and dismissing the action with prejudice.

DATED: January 24, 1992.

/s/ CAROLYN TURCHIN
Carolyn Turchin
United States Magistrate Judge

NOTICE: Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rule of Appellate Procedure should be filed until entry of the judgment of the District Court.